Supreme Court, U.S.
FILED

051627 MAR 10 2006

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DANNY WILLIAMS,

PETITIONER

vs.

ALBERTO GONZALES,
U.S. ATTORNEY GENERAL,;
UNITED STATES DEPARTMENT OF
JUSTICE, BUREAU OF PRISONS, ET AL.,

RESPONDEDTS

IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Danny M. Williams
831 Rice Rd #1118
Ridgeland, Mississippi 39157
601-853-0558

QUESTIONS PRESENTED

Were my Civil Rights violated under the Civil Rights Act of 1991 when I did not receive a trial by jury in lieu of summary judgment because of ineffective assistance of counsel?

Should the Sixth Amendment right to ineffective assistance of counsel include Civil Litigants when justice demands the truth and effective assistance of counsel can prove that one has been discriminated against, treated less favorably, denied fair and equal treatment and placed in a hostile work enviroment? It is likened to denying DNA to support a case to determine one's guilt or innocence when it is available for admission as supporting evidence.

Should rule 56(e) of Federal Rules of Civil Procedure be available to litigants who proceed Pro Se after Summary Judgment when he or she can produce supporting affidavits on a direct appeal which can be entered as admissible evidence, when it was initially part of the proceeding but was not entered for summary judgment due to ineffective assistance of counsel?

Does 42 U.S.C. Section 1981(b) provide employees with actionable claims for racial discrimination, harassment, retaliation, and discharge for conduct arriving after November 21, 1991, the effective date of the act?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A

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42 USCS s 2000e-16,n 43 **107**

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi Western division is not published.

The decision of United States District Court granting Respondent's appeal is unpublished.

The decision of the United States Court of Appeals to deny respondent's motion to supplement the record following Summary Judgment is not published.

The opinion of the United States Court of Appeals under Fed. R. App. P. 36 is not published.

JURISDICTION

The judgm[illegible]f the United States District Court for the Southern District of Mississippi Western Division was entered on January 10, 2005.

Petitioner timely sought rehearing, which was filed in the United States Court of Appeals on January 13, 2006.

The United States Supreme Court has jurisdiction under 28 U.S.C. s

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Civil Rights Act of 1991 in part: Grants a right to a jury trial on Title VII intentional discrimination claims for which compensatory or punitive damages are sought, id. S1977A (c), 105 Stat. 1071 (1991)

The Fourteenth Amendment to the U.S. Constitution sates in revelant part: No state shall... deprive any person of life, liberty, and the pursuit of happiness. Without due process of law.

The Sixth Amendment to the U.S. Constitution sates in revelant part: A person have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

42 U.S.C. 1981, in part provides that: all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts. full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...

29 U.S.C. 623 (d) in part provides that: It shall be unlawful for an employeer to discriminate against any of his employees because of race or gender.

STATEMENT OF THE CASE

Petitioner, Danny Williams is an African American Male hired by the Federal Bureau of Prisons on or about March 20, 1989. At all times relevant herein, I worked as a Food Service Administrator for the US department of Justice Federal Bureau of Prisons at the Federal Corrections Institutions in Yazoo City, Mississippi. A position I was qualified to hold. I was unjustly removed from my position and replace by a member of a non-protected class. **(see McDonnell Douglas v. Green , 411 U.S. 792, 802 (1973).** I was the Food Service Administrator at this facility for approximately two and a half years prior to the arrival of Associate Warden Scott p. Fisher. I (Danny Williams) received only Outstanding and Exceeds evaluations prior to the arrival of Associate Warden Scott P. Fisher. Associate Warden Scott P. Fisher used his position as Associate Warden and his

knowledge of food service to discriminate, create a hostile work environment and remove me from my position as Food Service Administrator. Associate Warden Scott P. Fisher knew that the only way to remove me from my position was either thru performance issues or conduct issues. Associate Warden Scott P. Fisher chose performance because he knew the language of food service and thus made it easy for him to place words on paper to give an impression that I was not performing my duties as Food Service Administrator. **Government employer's proffered reason for removing employee from position, that he performed poorly, was pretext where evidence shows that employee was not only rated highly on performance reports, but was highly praised by his peers in those areas in which his performance was alleged to be poor. (see 42 USCS 2000e-16, n 43 page 107).**

Associate Warden Scott P. Fisher immediately began communicating with the Acting Associate Warden Kathy Dileo, instructing her of language to use in my performance evaluation in order to justify first downgrade which was a Minimum Successful rating in Element 1.(Planning , Monitoring and Evaluating). This is the element Associate Warden Scott P. Fisher continued to down grade once he arrived at Federal Corrections Institution Yazoo City, Mississippi. In order to complete his plan in such a timely manner, Associate Warden Scott P. Fisher needed at least this Minimum Successful rating prior to his arrival. After his arrival Associate Warden Scott P. Fisher used no more time than necessary to achieve his goal. In fact, Associate Warden Scott P. Fisher arrived for duty at Federal Corrections institution Yazoo City in mid to late November of

2001. By the middle of February 2002, just three short months later I was placed on a Performance Improvement Plan which was used as an unlawful prevarication to remove me from the position as Food Service Administrator.

Associate Warden Scott P. Fisher used contradictory performance log entries to downgrade my performance evaluation. The log entries and rating were not in collaboration. This was easily accomplished because only the rating mattered. However, the rating should coincide with the language of the evaluation. (See performance evaluation written by Kathy Dileo) As stated earlier Associate Warden Scott P. Fisher needed at least one minimum successful rating prior to his arrival in order for his plan to quickly unfold. Observation of this element in comparison to elements written by

Associate Warden Scott P. Fisher will reveal that language used was that of the same person.

Associate Warden Scott P. Fisher However, Associate Warden Scott P. Fisher did not see the need for me to accompany him on inspections of the department. (See deposition of Associate Warden Scott P. Fisher page 70, line 20 thru 25, and Page 71, line 1 thru 19.) During sworn depositions Associate Warden Scott Fisher was asked about follow-up inspections. He repeatedly stated "I do not recall if corrections were made."" I believe it was", and "I think so". This would lead one to believe that Associate Warden Fisher did not care if these so called discrepancies he claim to have found while doing an inspection alone were rectified. Why? Because Associate Warden Scott P. Fisher knew he had the support of Warden Khurshid Z. Yusuff, With that, Associate Warden Scott P. Fisher knew he would

not be held accountable for discriminating against me, creating a hostile work environment, making false statements, documenting false information to be used in my removal from the position as Food Service Administrator. Associate Warden Scott P. Fisher placed negative log entries in my performance log because I would not place negative entries in the log of an African American female I supervised. Associate Warden Scott P. Fisher stated in his sworn deposition that this never happened. Associate Warden Scott P. Fisher's supporter Warden Khurshid Yusuff, stated in her sworn deposition that Associate Warden Scott P. Fisher did indeed ask me to place negative entries in the log of the Assistant Food Service Administrator.

Associate Warden Scott P. Fisher admitted in his sworn deposition that he played a role in the selection of my replacement. The replacement was a White

Male, non-protected class. **The Civil Rights Act of 1964 was enacted to prohibit discrimination on the basis of race and color.** After this selection, the vigorous secret inspections by Associate Warden Scott P. Fisher ceased . **The deposition of James Riley, Safety Manager, who is responsible for safety and sanitation inspections throughout the institution, would have proven harassment and discrimination. But, was not submitted in the District Court as evidence due to ineffective assistance of counsel.** The defense claims there was no longer a need to conduct inspections of the department because the department was quoted as running efficient. A Program Review Inspection, which is the highest authority of how the Bureau of Prisons food service establishments should operate rated the department under my leadership as acceptable. This is a passing rating which means all

components that assures a safe and orderly functioning food service department were in place. However, the defense have no explanation of how an efficient running department could have had so many un-noticed problems under the leadership of my replacement, John Torchio (White Male). The problems that plagued the food service department into a food strike and cost the Federal Bureau of Prisons over Three Hundred Thousand dollars. These problems did not happen overnight. Nevertheless, Associate Warden Scott P. Fisher never drafted a negative log entry on my replacement John Torchio. (White Male). This happened because for the first six months Associate Warden Scott P. Fisher supervised John Torchio, he was un-molested and not harassed. This treatment of John Torchio continued after he was supervised by Associate Warden Retired, James Mitchell. Mr. Torchio, my

replacement, because he was White was never subjected to harassment, hostility in the work place, or disparity treatment by Associate Warden Scott P. Fisher. Ironically, in six months under the supervision of Associate Warden Scott P. Fisher Mr. Torchio was recommended as Supervisor of the Quarter. I, on the other hand in six months was recommended for removal by Associate Warden Scott P. Fisher. Mr. Torchio had not been held to the same set of standards that I was supposedly demoted. I served as Food Service Administrator for two and a half years prior to the arrival of Scott P. Fisher. I never once had a food strike or any demonstration that derived because of food or food related issues. This tend to have one believe that Warden Khurshid Yusuff and Associate Warden Scott P. Fisher planned my demise and demotion from the moment Associate Warden Scott P. Fisher was selected.

Associate Warden Scott P. Fisher and Warden Yusuff hoped because of severe staff shortages the Program Review scheduled from December 10, 2001 thru December 14, 2001 would be less than favorable. Therefore, the failed Program review would be documentation enough. However, the department received an acceptable rating which is a passing rating. Associate Warden Scott P. Fisher had no choice but to continue his unfair harassment by demanding the Safety Manager, James Riley along with himself conduct more unnecessary inspections. The sworn deposition of James Riley will show that he was forced to conduct these harassing inspections. **(Due to ineffective assistance of counsel, this evidence was not submitted in the District Court and could not be raised on direct appeal.) Should Rule 56(e) of the United States Rules of Civil Procedure be enacted and made available to**

litigants who proceed Pro Se after summary judgment when admissible evidence can be produced on direct appeal?

Associate Warden Scott P. Fisher claims he specifically conducted an inspection on May 14, 2002. Associate Warden Scott P. Fisher cited many discrepancies during this inspection. In fact, Associate Warden Scott P. Fisher used the results of this inspection to request my removal from the position of Food Service Administrator. Truth is, Associate warden Scott P. Fisher did not conduct an inspection on May 14, 2002. Associate Warden Scott P. Fisher was participating in an executive function that held him away from the main kitchen for the entire morning. Associate Warden Scott P. Fisher did not come to food service until 11:00 a.m. to observe the noon meal and afterwards left and did not return to food service on this particular day. On the same

day an inspection was conducted by the safety department unknown to Associate Warden Scott P. Fisher. This inspection did not reveal any of the discrepancies Associate Warden Scott P. Fisher claims he discovered. This was just one more of Associate Warden Scott P. Fisher's schemes to drive towards my removal. **(see Lowe v. City of Monrovia, 775 F.2d 998, 1006(9th Cir. 1985) (plaintiff can establish prima facie case of disparate treatment without satisfying McDonnell Douglas test if he or she provides evidence suggesting termination based on discriminatory criteria).** Associate Warden Scott P. Fisher never made a practice of accompanying the Safety Manager on inspections of other departments. Only Food Service. Warden Yusuff admitted in a sworn deposition that she, Martha Mitchell, Regional Food Service Administrator and Associate Warden Scott P.

Fisher held a meeting after the program review. In this meeting the topic of discussion was a change of administration in the Food Service Department. The change meaning Myself It was stated that Associate Warden Scott P. Fisher did not want to change administration, instead he wanted to work with me. Associate warden Scott P. Fisher knew that he could not just change administration because a change was desired. Associate Warden Scott P. Fisher knew that a personnel action was necessary to remove me. With the support of Warden Khurshid Yusuff and the assistance of the Human Resource Manager, Associate Warden Scott P. Fisher used his authority to discriminate against me and ruin thirteen years of a career in six short months. **Does 42 U.S.C. Section 1981(b) provide employees with actionable claims for racial harassment, retaliation, and discharge for conduct arising after November 21, 1991, the**

effective date of the Act?

REASONS FOR GRANTING THE PETITION

The Fifth Circuit is deemed by Attorneys as the most conservative circuit in the land. While conservatism has it's place, it has been the practice of other circuits to find the facts and rule accordingly. In a similar case, Anderson v. Baxter healthcare Corp., the 7th Circuit held: to defeat summary judgment , Title VII plaintiff, "must only produce evidence from which a rational fact finder could infer that the company lied about it's proffered reason for dismissal.

Washington v. Garrett the 9th circuit held that the fact finder in a Title VII case is entitled to infer discrimination from plaintiff's proffer of a prima facie case and showing of pretext without anything more.

Sheridan v. E. I. Dupont De Nemours and Company, 3rd circuit ruled in favor of plaintiff after establishing a prima facie case and producing adequate evidence.

Sec. 2 [42 U.S.C. 1981 note] The congress finds that-

(1) additional remedies under Federal Law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in Wards Cove packing Co. v. Antonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of federal Civil Rights protection; and

(3) legislation is necessary to provide additional protection against unlawful discrimination in employment. Ref: EEOC/Civil Rights Act of 1991 page 1 & 2.

Quoting form Sheridan v. E. I. Dupont De Nemours and Company. As Chief Justice, then Justice, Rehnquist earlier had explained, the initial presumption of discrimination arises from the plaintiff's prima facie case of discrimination "because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

He continued:

> **[W]e are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons**

for the employer's actions, it is more likely than not the employers, who we generally assume acts only with some reason based his decision on an impermissible consideration such as race.

Lastly, the truth needs no explanation. Therefore, beyond a shadow of a doubt I believe I have evidence that will prove this case. Evidence that was not submitted or argued was due to ineffective assistance of counsel. Thus, giving serious consideration to the plea of civil litigants who have no alternative except to proceed Pro Se.

CONCLUSION

Danny Williams Respectfully submitted on this day the 9th of March 2006.

INDEX TO APPENDICIES

APPENDIX A

The decision of the United States Court of Appeals

APPENDIX B

The order and final judgment of the United States District Court

APPENDIX C

Initial Order of U.S. Magistrate for the United States District Court (Southern District)

APPENDIX D

Denial of United States district Court of Respondents' motion to supplement the record in this case.

United States Court
of Appeals
Fifth Circuit
FILED
December 13,2005

Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 05-60105
Summary Calender

D. C. Docket No. 5: 03-CV-442

DANNY WILLIAMS

Plaintiff - Appellant

v.

ALBERTO R. GONZALES, U S ATTORNEY GENERAL; UNITED STATES DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

Defendant - Appellees

Appeal from the United States District Court for the Southern District of Mississippi, Jackson.

Before KING, Chief Judge, and BARKSDALE and BENAVIDES, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: FEB 0 6 2006

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit
S/ Dawn D. Actionies
Deputy
New Orleans, Louisiana

File Stamped Feb 06 2006

United States Court
of Appeals
Fifth Circuit
F I L E D
December 13,2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60105
Summary Calendar

DANNY WILLIAMS

Plaintiff - Appellant

v.

ALBERTO R. GONZALES, U S ATTORNEY GENERAL; UNITED STATES DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

Defendant - Appellees

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 5: 03-CV-442

Before KING, Chief Judge, and BARKSDALE and

BENAVIDES, Circuit Judges.

PER CURIAM:

Danny Williams appeals form the district court's order granting summary judgment to the defendants in his Title VII suit alleging discriminaton based on race and gender. We review the district court's decision order de novo. American Home Assur. Co. v. United space Alliance, LLC, 378 f.3D 482 (5TH Cir. 2004) ; see also Fed. R. Civ. P. 56.

Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47. 5. 4.

Williams presents no argument in his brief concerning allegations of discrimination based on gender. Accordingly, those claims are deemed abandoned. See Yohey v. Collins, 985 F. 2d 222, 224-25 (5th Cir. 1993). Similarly, Williams offers no argument concerning the district court's conclusion that Williams exhausted administrative remedies only with respect to incidents occurring after March 27, 2002, which was 45 days prior to his first contact eith the EEO Counselor, and that all other claims were unexhausted and time-barred. By faining to address the basis of the district court's decision, Williams has abandoned calims related to incidents prior to March 27, 2002. see Yohey, 985 F.2d at 224-25; Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F. 2d 744, 748 (5th Cir. 1987).

Williams arfues that he was demoted from Food Services Administrator to training instructor as a result of Associate Warden Fisher's racial animus and conspiracy with other prison supervisory officials. To establish a prima facie case of discrimination, a plaintiff must have shown that (1) he was subject to adverse treatment or was denied an employment benefit or opportunity by the employer; (2) he as a member of a protected froup; and (3) a similarly situated individual not a member of his protected group was treated more favorably. see McDonnell Douglas Corp. v. Green, 411, U.S. 792, 802 (1973) ; see also Auguster v. Vermilion Parish School Bd., 249 F. 3d 400, 403 (5th Cir. 2001) . Williams has not shown that person outside of a

Protected class were treated more favorably that her ot that the legitimate performance-related reason articulated by the defendants for the demotion was pretextual. See St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, 507 (1993).

Williams also argues that he received ineffective assistance of counsel because his attorney did not produce testimony from witnesses that allegedly would have created a eenuine issue of material fact. The right to effective assistance of counsel does not apply in a civil context. Sanchez v. U.S. Postal Serv., 785 F.2d 1236, 1237 (5th Cir. 1996). Williams further asserts in his statement of issues that the defendants ignored an order from the EEOC to take corrective action regarding his complaint. This issue is not addressed because it is raised for the first time

on appeal and is inadequately briefed. See leverette v. Louisville Ladder Co., 183 F.3d 339, 342 (5th Cir. 1999) ; Yohey, 985 F.2d at 224-25. The district court did not err in tis summary judgment order.

AFFIRMED.

Southern District of Mississippi
FILED

JAN 10 2005
J T. Noblin, Clerk
By_____Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DANNY WILLIAMS PLAINTIFF

v. Civil Action No. 5: 03-cv-442 (Br) (Su)

JOHN ASHCROFT IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, ACTING BY AND THROUGH THE UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS

DFENDANTS

FINAL JUDGMENT

This cause having come before the Court on the defendants' motion for summary judgment, and the Court having issued a memorandum Opinion finding the motion to be well-taken, and having issued an

order granting same; accordingly,

IT IS HEREBY ORDERED AND ADJUDGED that this action is dismissed with prejudice.

SO ORDERED AND ADJUDGED, this the 7th day of January, 2005.

s/David Bramlette
UNITED STATES DISTRICT JUDGE

Southern District of Mississippi
FILED

JAN 10 2005
J T. Noblin, Clerk
By_____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DANNY WILLIAMS PLAINTIFF

v. Civil Action No. 5: 03-cv-442 (Br) (Su)

JOHN ASHCROFT IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, ACTING BY AND THROUGH THE UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS

DFENDANTS

MEMORANDUM OPINION

This cause is before the Court on the defendants' motion to dismiss or in the alternative for summary judgment **(docket entry 23).** having carefully considered the motion and response, the memoranda of the parties filed in support thereof, and the

applicable law, the Court finds as follows:

This case is brought by federal bureau of Prisons employee Danny Williams under Title VII of the Civil Rights Act of 1964. Mr. Willliams alleges he was discriminated against due to his race (African-American) and gender (male). He is presently employed at FCI Yazoo City as a vocational Trainng Instructor with the united States Department of Justice, federal Bureau of Prisons. In his complaint, the plaintiff alleges a number of discriminatory incidents occurring over a period from December of 2001 until September 8, 2002, when he was demoted from food service administrator ro a Training instructor. His allegations are primarily targeted toward his two former supervisors, Warden

Khurshid Z. Yusuff (Asian female), retired, and Associate Warden Scott Fisher (white male). The alleged discriminatory incidents, as stated in paragraphs 7-12 of the complaint, are set forth as follows:

7. On or about December 2001, Danny Williams received a written rerimand for allegedly refusing to make negative log entries in the performance log of an African American employee whom he supervised.

8. On February 25, 2002, Danny Williams was placed on a Performance Improvement Plan.

9. On May 23, 2002, Danny Williams was not permitted to attend a training for department heads although he had received notice that the training session was mandatory.

The Warden, on or about June 21, 2002 sent

an e-mail to all deprtment heads stating that mandatory training would take place on june 25, 2002. As Danny Williams approached the visiting gate leading into the Federal Corrections Institution compound, on June 25, 2002 at 7:20 am, he noticed that AWO Scott P. Fisher ("AWO fisher") and Robin Harmon, Trust Fund Supervisor, were standing at the gate. When AWO Fisher noticed Danny Williams, he said "damn". robin Harmon asked "what's wrong?" AWO Fisher did not reply. He instead told Danny Williams that "There is training at the training center but you don't have to be there."

12. On September 8, 2002, Danny Williams was demoted to a Trainng Instructor.

(Complaint, I I 7-12). Williams contends that he "received treatment different from that afforded to other similarly situated

Whites because of his status a an African-American." (Complaint I 19). He also contends the he "received treatment different from that afforded to other similarly situated females because of his status as a male". (Complaint, 23).

The defendant move for dismissal pursuant to Fed. R. Civ. P. 12(b) (6) or, in the alternative, summary judgment pursuant to Fed. R. Civ. P. 56. A complaint may be dismidded under Rule 12 (b) (6) for falure to sate a claim "only if it is clear that no relief could be granted under any set of facts that could be proved consistent eith the allegations." Hishon v. king & Spalding, 467 U.S. 69, 73 (1984). In deciding a motion to dismiss under Rule 12(b) (6), [t]he court must construe the complaint in a light most favorable to the plaintiff, and accept all of [the] factual allegations as true." Bloch v. Ribar, 156 F. 3d 673,

677 (1988). If, on the motion to dismiss pursuant to Rule 12(b) (6), matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment. Fed. R. civ.P. 12 (b).

Because both the defendants and the plaintiff have submitted matters outside the oleadings, the Coourt shall treat the defendants' motion as ond for summary judgment where "the pleadings, depositions, answers to interrogatories and admissions on file together with affidavits, if any, show that there is no genuine

dispute as to any material fact and tht the moving party is entitled to judgment as a matter of law." Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986). The existence of a material question of fact is itself a question of law that the district court is bound to consider before granting summary judgment. John v. F 2d State of La. (Bd of T. for State C & U.), 757 F. 2d 698, 712 (5th Cir. 1985).

The district court's functionat the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. There is no issue for trial unless there is sufficient favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson v. Liberty lobby, Inc., 477 U.S.

242, 249-50 (1986).

Although Rule 56 is peculiarly adapted to the dispoition fo legal questions, it is not limited to that role. Professional Managers, Inc. V. Fawer, Brian, Hardy & Zatzkis, 799 F.2d 218, 222 (5th cir. 1986). "The mere existence of a disputed factual issue, therefore , does mot foreclose summary judgment. The dispute must be genuine, and the facts must be material. "Id. "With regard to 'materiality,' only those disputes over the facts that might affect the outcome of the lawsuit under the gor _ verning substantive law will preclude summary judgment." Phillips oil Company v. OKC Corp., 812

F. 2d 265, 272 (5th Cir. 1987). Where "the summary judgment evidence establishes that one of the essential elements of the plaintiff's cause of action not exist as a matter of law, ...all other contested ussues of fact are rendered immaterial." Topalian v. Ehrman, 954 F. 2d 1125, 1138 (5th Cir. 1992) (citing Celotex, 477 U.S. at 323).

In making its determination fo fact on a motion for summary judgment, the court must view the evidence submitted by both parties in a light most favorable to the non-moving party. McPherson v. Rankin, 736 F. 2d 175, 178 (5th Cir. 1984) the moving party has the duty to demonstrate the lack of a genuine issue of material fact and the appropriateness of judgment as a matter of law to prevail onits motion. Union planters Nat. Leasing v. woods, 687 F .2d 117 (5th Cir. 1982). The moving party accomplishes this by informing the

court of the basis of tis motion and by identifying portions of the record which highlight the absence of genuine factual issues. Topalian, 954 F. 2d at 1131.

Once a properly supported motion for summary judgment is presented, the non-moving party must rebut with "significant probative" evidence. Ferguson v. National Broadcasting Co., Inc. 584 F.2d 111, 114 (5th Cir. 1978). In order words, " the nonmoving litigant is required to bring forward 'significant probative evidence' demonstrating the existence of a triable issue of fact."In re Municipal Bond Reporting Antitrust Lit., 672 F. 2d 436, 440

(5th cir. 1982) (citing Ferguson v. National Broadcasting Co., Inc., 584 F. 2d 111, 114 (5th Cir. 1978). To defend against a proper summary judgment motion, the non-moving party may not simply refer back to the allegations of his pleadings. Leslie v. Ingalls shipbuilding, Inc., 899 F. Supp. 1578, 1580 (S.D. Miss. 1995) the non-moving party's response, by affidavit or otherwise, must set forth specific facts showing that there is a genuine ussue for trial. Fed. R. Civ. P. 56(e); Union Planter Nat. Leasing v. Woods, 687 F. 2d at 119. While "[t]he moving party need not support its motion with affidavits or ther evidence, ... to defeat a motion for summary judgment the nonmoving must present evidence sufficient to establish the existence of each element of his claim as to which he will have the burden of proof at trial." Pavone v. Mississippi Amusement Corp., 52 f.3d 560, 565 (5th Cir. 1995) (citation omitted). Consequently, "[n]either 'unsubstantiated assertions' nor 'conclusion allegations'

can satisfy the non-moving party's burden." Lawrence v. University of Tex. Medical Branch at Galveston, 163 f. 3d 309, 312 (5th Cir. 1999) (ciation omitted).

Moreover, a claim tht further discovery or a trial might reveal facts of which the plaintiff is currently unaware is insufficient to defeat the motion. See Woods v. Federal Home Loan Bank Bd., 826 F. 2d 1400, 1414,-15 (5th Cir. 1987). If the nonmoving fails to satisfy its burden, summary judgment is required. leslie, 899 F. Supp. at 1588.

Summary judgment is available in employment discrimination cases and is appropriate where "critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmoving, or where it is so everwhelming that if mandates judgment in faovr of the movant." Armstrong v. City of Dallas, 997 F. 2d 62, 67 (5th Cir. 1993). "If the movant satisfies its initial burden of demonstrating the absence of a material fact issue, 'the non-movant must identify specific evidence in the summary judgment rrecord demonstrating that there is a material fact issue concerning the essentail element of its case for which it will bear the burden of proof at trial.'" Douglass v. united States Automobile assn'n, 79 F. 3d 1415, 1429 (5th Cir. 1996). (quoting Forsyth v. Barr, 19 F. 3d 1527, 1533 (5th Cir. 1994).

"[C]onclusory allegations, speculation and unsubstantiated assertions are inadequate to satisfy the nonmoving burden." Id. Futhermore, it is "well-settled that an employee's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion, in the face of proof showing an adequate nondiscriminatory reason." Id. at 1430; see also Odom v. Frank, 3 F. 3d 839, 849 (5th Cir. 1993) (finding athat anecdotal evidence and bare speculation are not enough to survive summary judgment).

Several of the plaintiff's allegations must be dismissed because he failed to exhaust his administrative remedies. When

Congress enacted Title VII, it required that certain procedures be established as a prerequisite to bringing an employment discrimination claim in federal court. 42 U.S.C. s 20003-16(b). the Equal Employment Opportunity Commission, pursuant to this statutory authority, established clear guidelines governing federal employees' discrimination claims at the administrative stage. Of significance in this action, 29 C.F.R. s 1614.105 (a) (1) mandates that a federa employee bring incidents of alleged discrimination to the attention of the agency's Equal Employment Opportunity Counselor ("EEO Counselor") within 45 days of the date he knew, or should have known, of the discriminatory act. See Teemac v. Henderson, 298 F. 3d 452, 454 (5th Cir. 2002). If the federal employee fails to timely refer the matter to an EEO

Counselor, his claims are barred. Id.

These procedures establish "rigorous administrative exhaustion requirements and time limitations" as a "precondition" to a federal employee's fight to gile a Title VII action in federal court. Brown v. General Services Administration, 425 U.S. 820, 833 (1976). As the First Circuit stated in Misra v. Smithsonian Astrophysical

Observatory:

Under the principal of sovereign immunity, individuals may not sue the United states without its consent. This immunity extended to suits brought under the Civil Rights act of 1964 (the "Act"). In 1972, Congress amended the act to waive the federal government's sovereign immunity for employment discrimination actions against wvarous federa agencies and institution and to permit federal court jusisdiction over such violations. Congress also

Outlined, as a condition of this waiver, a series of administrative remedies which a claimant must exhaust Before filing suit in federal court.

248 F. 3d 37, 39 (1st Cir. 2001) (internal citations omitted).

Strict adherence to time limits is also required to prevent litigation of stale claims. see, e.g., Delaware State college v. Ricks, 449 U.S. 250, 256-57 (1980) ("The limitation periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from decisions are long past."). Consequently, where federal employees fail to avide by the limitations period within which to contact an EEO Counselor, courts have not hesitated to dismiss their claims. As the Supreme Court has advised, "a discriminatory act which is not made the basis for a timely charge is the

legal equivalent of a discriminatory act which occurred before the statue was passed... it is merely an unfortunate event in history which has no present legal consequence." United Air Lones v. Evans, 431, U.S. 553, 558 (1977).

The plaintiff referred his allegations of discrimination to the EEO Counselor on june 11, 2002. (Federal Bureau of Prisons Report of Investigation Re: Danny Williams (hereafter "ROI"), Ex. B-4 attached thereto). Accordingly, he has exhausted his administrative remedies only with respect to the incidents that occurred after March 27, 2002- 45 days before he contacted the EEO

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legal equivalent of a discriminatory act which occurred before the statue was passed it is merely an unfortunate event in history which has no present legal consequence." United Air Lines v. Evans, 431 U.S. 553, 558 (1977).

The plaintiff referred his allegations fo discrimination to the EEO Counselor on June 11, 2002. (Federal Bureau of prisons Report of Investigation Re: Danny Williams (hereafter "ROI"), Ex. B-4 attached thereto). Accordingly, he has exhausted his administrative remedies only with respect to the incidents that occurred after March 27, 2002- 45 days before he contacted the EEO

Counselor. All of his other claims are time-barred because they were not timely referred to an EEO Counselor.

The plaintiff claims that he was demoted from Food Service Administrator to Vocational Training Instructor as a result of dicerimination because of his race and gender, and in retaliation for his participation in Title VII-protected activity (filing his claim with the EEO Counselor). The Court shall address his claims of race and gender discrimination, then his clalim for retaliatory demotion in violation of Title VII.

In order to establish a prima facie case of race or gender discrimination, the plaintiff must show: (1) he is a member of a protected group. St. Mary's Honor Center v. Hicks, 509, U.S. 502, 506 (1993); Tex.

Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnel Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Alternatively, the plaintiff may establish a prima facie case by showing that he is a member of a protected class, he was qualified for the position , and persons outside the protected class were treated more favoebly atha he. Waggoner v. City of Garland, 987 F. 2d 1160, 1163 (5th Cir. 1993). At all times, the plaintiff has the ultimate burden to prove race and sex discrimination. Hicks, 509 U.S. at 510.

Once the prima facie case is established, the burden then

shifts to the employer to articulate a llegimate, nondiscriminatory reason for its actions. McDonnell Douglas, 411 U.S. at 802. If the employer neets its burden, the prima facie case is dissolved, and the burden shifts back to the plaintiff to establish that the reason proffered by the employer is merely a pretext for discrimination. Id.; Rhodes v. Guiberson Oil Tools, 39 F. 3d 537, 542 (5th Cir. 1994). To demonstrate a "pretext for disctimination." the plaintiff must show both that the employer's proffered reason was false and that race or sex discrimination was the real reason. See Hicks, 509 U.S. at 510; Rhodes, 39 F. 3d at 542.

An employee's own subjective belief of race and sex discrimination, however genuine, cannot be the

basis for judical relief. Little v. Republic Refining Co, , 924 F. 3d 93, 96 (5tth Cir. 1991).; Sherrod v. sears Roebuck & Co., 785 F. 2d 1312, 1316 (5th Cir. 1986); Elliot v. Group Medical & Surgical Serv., 714 F. 2d 556, 557 (5th Cir. 1983). Although Title VII protects employees against racial and sex discrimination in the rerms and conditions of employment, it does not afford minorities special preferences or place upon the employer an affiemative duty to accord them special treatment. See Williams v. General Motors Corp., 656 F. 2d 120, 129 (5th Cir 1981).

The Fifth Circuit has held that only actions affecting ultimate employment decisions, such as hiring , promoting,

Compensatinf, granting leave, and firing, can constitute adverse employment actionf for the purposes of establishing a prima facie case for retaliation. See Mattern v. Eastman Kodak, 104 F. 3d 702, 707 (5th Cir. 1997); Dollis v. Rubin, 77 F. 3d 777, 782 (5th Cir. 1995) (citing page v. Bolger, 645 F. 2d 227, 233 (4th Cir. 1981)); see also Padilla v. Carrier Air Conditioning, 67 Supp. 2d 650, 656 (E.D. Tex. 1999). Most of the plaintiff's claims of discrimination fail to rise to the level of an adverse employment action.

The plaintiff calims that he; (1) received a written reprimand for allegedly refusing to make negative log entries in the performance log of an African American employee who he supervised; (2) was placed on a performance improvement plan; (3) received low

quarterly performance log ratings; and (4) was not permitted attend a training session for department heads. However, these alleged incidents do not rise to the level of adverse employment actions. The plaintiff

has produced no evidence of a written reprimand. Furthermore, documented reprimands alone, and negative performance evaluations, even if underseved, do not constitute "adverse employment actions" under Title VII. Thompson v. Exxon Mobil Corp., 344 F. supp 2d 971,981 (E.D. Tex. 2004). See also Douglas v. Dyn McDermott petroleum Operations Co., 144 F. 3d 364, 373, fn.11 (5th Cir. 1998) (even if employee evaluations was "low" it was not an adverse employment action). Similarly, the Fifth Circuit has specifically held that placing an employee on a

Performance inprovement plan alone is not an "ultimate employment decision." Felton v. Polles, 315 F. 3d 470, 488 (5th Cir. 2002) (citing Mattern, 104 F. 3d at 708). Denial of an opportunity to attend a department head training meeting is also not an adverse employment action. See Dollis, 77 F. 3d at 781-82 (alleged denial of attendance at conference not sufficient to establish an adverse employment action). Thus, the only claim alleged by the plaintiff which rises to the level of an adverse personnel action is his demotion.

At all times revelant to this action, while the plaintiff was Food Service, his first-line supervisor was Associate Warden of Operations scott Fisher, a white male, and his second-line supervisor was

Warden Kurshid Yusuff, and asian female. (ROI, Exh. F-1, p.5). Prior to Fisher's arrival at FCI Yazoo City as an associate Warden, he spent approximately thirteen (13) years in various Food Service

Departments within the federal Bureau of prisons. (Depositions of Scott Fisher, pp. 32-41). His position as associate Warden of Operations at FCI Yazoo City required that he have direct oversight of the FCI Yazoo City food Service Department. (Id at 41; ROI,

F-4, PP. 10-11).

Upon Fisher's arrival at FCI Yazoo City in November of 2001, he discovered many areas under the plaintiff's supervision which were unsatisfactory and which were not operating in accordance with the Agency's policies and the plaintiff's performance standards.

(ROI, Exh. F-4, pp. 1, 12-14; Deposition of Scott Fisher, p. 66). Specific areas fo concern regarding the Food Service Department operations inclided: (1) the Cook Supervisors, under the plaintiff's chain of command, were inadequately trained; (2) oftentimes the meals served to inmates and staff were not at the correct temperature potentially causing food-borne illness; (3) the saintation fo the department was unacceptable; (4) supplies were inadequately maintained; (5) religious diets were not being adhered to; (6) procedures for the cook/chill program were not being adhered to; and (7) the Food Service staff was corrected when using improper procedures to serve food. (Deposition of Scott Fisher, pp. 68-121; ROI, Exh. F-4, pp. 17-51). Further, upon

inspection of the Food Service Department, Fisher discovered several cross-contamination and sagety issues pertaining to food in the department. (Deposition o fscott Fisher, pp. 94-95; ROI, Ehx. F-4).

During the period of December 10-13, 2001, a Program Review of thc Food Service department was conducted by the Bureau of prisons. (Depposition fo Scott Fisher, Ehx. 3). The review was a comprehensive examination of the Food service operations with attention given to the performance of the vital functions regarding sanitation, quality and service management. (Id.). Thc Department received an "Acceptable" rating with ten noted deficiencies. (Id.; ROI, Ehx. F-4, p.25). The program Review, in the "General

comments" section, noted several areas with respect to food safety that needed improvement:

> On Monday, December 10, 2001, a comprehensive food safety and sanitation inspection revealed sanitation at an acceptable level at the main institution and excellent at the camp. Several areas were noted in the area of food safety that needed improvement. Sanitizing and air drying of equipment were not being accomplished due to the use of paper towels to clean and dry equipment. Further attention is needed in regards to food temperatures during cooking, holding, cooling, and serving times. Food Service staff were very receptive to advi[c]e ion methods to improve and maintain required levels of sanitation. The AFSA must continue training and providing guidance to cook supervisors and other non-food service staff assigned to Food Service.

(Deposition of Scott Fisher, Exh. 3, p. 4).

The review specifically noted four (4) deficiencies which related to food not being at correct temperatures, and failure of the cook supervisors to use calibrated thermometers to ensure attainment and maintenance of proper internal cooking, holding, or refrigeration temperatures of all

potentially hazardous foods. (Id., pp. 6-7. Moreover, the review found that hazardous chemicals were not controlled and accounted for daily. (Id., p. 7). The review also found that cutting boards, pans, and food inserts used in the production of foods for religious diets were not identified for use only in the Religious Diet program. (Id.). It was also noted that the meat and dairy service utensils were not stored in separate areas. (Id.).

Prior to the Program Review, a Staff Assistance Visit was

conducted by the regional food Services Administrator, Martha Mitchell, an African-American female, from October 30 through November 1, 2001. (Deposition of Martha Mitchell, pp. 35-46). Mitchell found and noted several deficiencies in the Food Service Department. (Id. , Staff Assistance Visit ("SAV"). She found that daily cleaning were not being followed and sanitation was not being maintained in accordance with policy. (SAV, P. 2). It was noted that hazardous chemicals were observed unsecured in pots and pans area. (Id.). Deficiencies were noted with respect to the Special Feeding Program were not marked and the utensils for meat and dairy were not stored separately. (Id.). Similar deficiencies noted during the Staff Assistance Visit with respect to hazardous chemicals and the utensils for the Religious Diet Program were also noted during the

Program review held in December of 2001. (Deposition of Martha Mitchell, pp. 42-44).

On January 31, 2002, Associate Warden Fisher conducted another inspection of the Food Service department. Sanitation continued to be a problem. (Deposition of Scott Fisher, pp. 125, 131-133.) During this inspection, Fisher noted approximately 120 sanitation deficiencies. (Id., p. 133 and Exh. 4). Deficiencies noted included: (1) inmates eating and drinking in food preparation areas; (2) potential cross-contamination; (3) inaccurate temperature of potentially hazardous foods in storage and being

offered for service during the lunch meal; and (4) pork spareribs served on January 21, 2002 (ten days prior), still being stored as leftovers. (Id.). The results of this inspection were noted in the Plaintiff's Performance Log by an entry dated February 1, 2002. (Deposition of Scott Fisher, Exh. 14).

On February 25, 2002, the plaintiff received an entry in his Performance Log which references the January 31, 2002, sanitation inspection of the Food Service Department wherein approximately 120 deficiencies were noted, with many having the potential of causing food-borne illnesses. (Id., p. 4). The Performance Log entry also states that a follow-up inspection of the Food Service Department was conducted on February 12, 2002, during the January 31, 2002, inspection still existed with no indication that an

attempt had been made to rectify those deficiencies. (Id.). It was further noted that the plaintiff had been counseled several times regarding his responsibility to train his staff and monitor their performance by performing daily inspecting and by conducting additional training. (Id., p. 5).

Consequently, the plaintiff was placed on a Performance Improvement Plan on February 25, 2002. (Deposition of Scott Fisher, Exh. 12; ROI, Exh. F-1, p. 10) the Performance Improvement Plan required the plaintiff to manage the day-to-day operations of the food Service Department. Specifically, the

plaintiff was to provide training to his staff in the policies and procedures governing their responsibilities, to allow them to work independently without constant intervention. (Id.). The plaintiff was also required to conduct daily inspections of the Food Service Department to assure staff adherence to policies and procedures. In addition, with respect to any deficiencies identified, it was the plaintiff's responsibility to motivate his staff to correct the areas of concern with training and coaching, in order to improve their performance. (Id.). The plaintiff was also to ensure that sanitation inspections, and to follow up on inspections in areas that were noted as deficient. (Id.). In addition, the plaintiff was to establish priorities and provide a timetable for attainment of goals needed for corrective actions or program improvements identified from safety and sanitation

inspections. (Id.).

On or about May 23, 2002, the plaintiff received and overall Fully Satisfactory Performance Appraisal for the period of April 1, 2001- March 31, 2002. [1] (Deposition of Scott Fisher, Exh. 13; ROI, Exh. F-24). The plaintiff's Performance Appraisal was completed by Associate Warden Fisher. (ROI, Exh. F-24, p. 3). In the May 23, 2002 Performance appraisal, the plaintiff received a Minimally Satisfactory rating in Element No. 1. (ROI, Exh. F-26, p. 1).

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[1] Employee Performance appraisals range from Outstanding, Exceeds, Full Satisfactory, Minimally Satisfactory, and Unsatisfactory.

Element No. 1 of the Performance Appraisal rates the plaintiff's ability as department head to plan, monitor, and evaluate various tasks. (ROI, Exh. F-1, p. 5). The Performance Appraisal noted that the plaintiff and difficulty throughout the rating period with monitoring and evaluating the operation of the Food Service Department. (Id.). Further, the plaintiff had problems understanding the importance adhering to priorities, and he failed to establish a timetable for goals and objectives established by both policy and his supervisor. (Id.).

A follow-up review of the food Service Department was conducted during the period of May 12- 16, 2002. As with the Staff Assistance Visit and the Program Review, several deficiencies regarding sanitation and safety issues were noted. (Deposition of Scott Fisher, Exh. 10). Again,

deficiencies were noted with respect to the roper holding temperatures for leftover foods which crated the potential for food borne illness. (Id.). Repeat violations were also found regarding the storage of chemicals and Religious Diet Program. (Id., pp. 2-3). The deficiencies found in this follow-up review were noted in an entry dated May 24, 2002 in the plaintiff's Performance Log. (Deposition of Scott Fisher, Exh. 15, pp. 2-3).

Consequently, on June 3, 23002, the Plaintiff received an Unsatisfactory Performance Log entry for Element No. 1. (Deposition

of Scott Fisher, Exh. 15, p. 2; ROI, Exh. A-2). Then on June 18, 2002, the plaintiff was issued a notice proposing charges for his removal as the Food Service Administrator for unsatisfactory performance of assigned duties from Associate Warden Fisher. (ROI, Exh, F-21, p. 1). Subsequently, the plaintiff had two opportunities to orally respond to the proposal letter for removal -one with Jose Vasquez on July 18, 2002, and another with Warden Yusuff on August 9, 2002. (ROI, Exh. F-21, pp. 10-12).

On August 28, 2002, upon consideration of the proposal, oral and written responses, and all relevant information contained in the adverse action file, Warden Yusuff decided to full support the charge of Unacceptable Performance of Assigned Dutics. In lieu of removal, Warden Yusuff

demoted the plaintiff to the position of Training Instructor, effective September 8, 2002. (ROI, Exh. F-21).

On June 11, 2002, Plaintiff initiated his first contact with an EEO counselor. (ROI, Exh B-4). On July 12, 2002, the plaintiff formally filed his complaint of discrimination against the Agency. (ROI, Exh. B-5). Subsequently, the agency accepted for investigation Plaintiff's allegation that he was discriminated against based on his race (African American) and sex (male), when he was subjected to a hostile work environment and when on or about June 25, 2002, he was not permitted to attend a department head

training meeting, and the associate warden recommended that he be removed from his position as Food service Administrator, Id, Ex. 1, ROI, Ex. C1.

Informal efforts to resolve the matter were unsuccessful. The plaintiff then requested a hearing before an EEOC Administrative Judge. On June 9, 2003, Administrative Judge Clarence Bell issued a decision without a hearing in favor of the agency. (Decision in the Matter of Danny Williams v. John Ashcroft, et al., EEOC Case No. 130-2003-08096-X). Administrative Judge Bell found that the evidence presented did not support the plaintiff's allegations of a hostile work environment, harassment, or reprisal. (Id.). On August 28, 2003, the plaintiff filed the instant action before this Court.

In response to the defendants' motion for summary

judgment, the plaintiff has not bought forward any evidence to show that the alleged letter of reprimand, Performance Improvement Plan, low Quarterly evaluation log entry, denial to attend training meeting, or the ultimate decision to demote the plaintiff were due to his race or sex, or that other similarly situated persons of different race or sex were ultimately demoted. The defendants have put forward significant evidence, however, that the personnel actions alleged by the plaintiff were a direct result of Associate Warden Fisher's assessment that the Food Service Department was poorly run and the performance of the department was unsatisfactory, of

Regional Food Service Administrator Mitchell's findings of deficiencies in the Food Service Department during the Staff Assistance Visit, and of the Program review. The plaintiff was informed of the Regional Food Service Administrator Mitchell's findings of deficiencies in the Food Service Department during the Staff Assistance Visit need to correct the deficiencies and was given an opportunity to do so. Plaintiff has presented no evidence suggesting that any of the actions he complains of were due to his race or sex, nor has he provided any evidence to rebut the agency's legitimate, nondiscriminatory reasons for its actions.

The plaintiff has also failed to establish that non-black employees or female employees were treated more favorably than he. The plaintiff has identified three comparators, Brenda Bush, a white female; Thomas Ivy, a white male, former Food Service

Administrator of the Food Service Department at FCI Yazoo City; and John Torchio, a white male, the current Food service Administrator.

The Fifth Circuit has held that "To establish disparate treatment, a plaintiff must show that the employer gave preferential treatment to another employee under "nearly identical circumstances;" that is, "that the misconduct for which the plaintiff was [demoted] was nearly identical to that engaged in by ...[other] employee [s]." Okoye v. The University of Texas Houston Health Science Center, 245 F. 3d 507, 513 (5th Cir. 2001) (citation omitted). See also Lockett v. Wal-Mart Stores, Inc., 2004 WL 21006411 (E.D. Tex).

Brenda Bush, formerly head of the Financial Services

Department, is not a proper comparator. She was removed as department head for continuously reporting inaccurate financial information to the executive staff. (Deposition of Scott Fisher, pp. 47, 55). She is now the Internal Control Manager. (Id., p.48). Associate Warden Fisher recommended that Bush be demoted. (Id., p. 178) Bush's discipline was based on conduct rather than performance, i.e., it was based on a blatant disregard for Agency policy regarding honesty. She was additionally recommended for an investigation by the Office of Internal Affairs. (Id., p. 179). The plaintiff, however, was demoted for performance-based issues. The Fifth Circuit has held that employees who engaged in different violations of company policy are not nearly identical for purposes of Title VII. See Okoye, 245, F. 3d at 513; see also Coleman v. Exxon Chemical

Corporation, 162 F. Supp. 2d 593 (S.D. Tex.2001) (employee with different responsibilities, different capabilities, different work rules violations, and different disciplinary rewards is not nearly identical). Thus, Brenda Bush is not an appropriate comparator.

Similarly, Thomas Ivy and John Torchio are not suitable comparators. Prior to Fisher coming to FCI Yazoo City, during his tenure as Regional Food Service Administrator, fisher was asked by the Warden at Fort Dix, New Jersey to review the Food Service Department at FCI Fort Dix, which was then headed by Thomas Ivy, (Deposition of Scott Fisher, pp. 169-172). Plaintiff has tried to

make much fo the fact that Fisher did not recommend Ivy for removal based on deficiencies in Ivy's department. However, it is undisputed that this was not part of Fisher's role as Regional Food Service Administrator. (Id., p. 171). The Regional Food Services Administrator functions as a technical advisor to the Warden at various BOP institutions. (Deposition fo Martha Mitchell, pp. 10-30). The warden and their deputies are responsible for the food service departments of their respective institutions. (Id., p. 31). Consequently, the managing officials responsible for any disciplinary action taken toward Ivy would have been the Warden and the deputy at FCI Fort Dix, not Fisher. The Fifth Circuit has held that circumstances are not nearly identical when employees' actions are reviewed by different supervisors. See Okoye, 243 F. 3d at 513; Coleman, 162 F.

Supp. at 613.

For similar reason, John Torchio is not a suitable comparator. Associate Warden Fisher only supervised Torchio from December 2002 until May 2003. Prior to Torchio becoming Food Service Administrator, Fisher had provided oversight to the Food Service Department. After Torchio assumed leadership fo the department, Martha Mitchell's observation of the Food Service Department was that it was running in an efficient manner. (Deposition of Martha Mitchell, p. 35).

The plaintiff attempts to make much of the fact that a food strike occurred in April 2004, during Torchio's Tenure. Williams

argues that the After Action Report concerning the food strike points to numerous problems similar to the one he experienced during his tenure, yet Torchio was not removed from his position as Food Service Administrator. Again, the plaintiff ignores the fact that management officials other than Fisher and Warden Yusuff were overseeing the Food Service Department. Prior to and during the food strike, Warden Pettiford and James Mitchell, Associate Warden of Operations, Provided oversight of the Food Service Department. According to the legal principles of Okoye, 243 F.3d at 513, Torchio is not a suitable comparator. Having failed to identify a suitable comparator, the plaintiff cannot establish a prima facie case. Moreover, the defendants have articulated legitimate, nondiscriminatory reasons for the plaintiff's demotion, and the plaintiff has not

shown that these reasons are pretextual.

As for the plaintiff's theory of liability based on disparate impact, he must show that a policy or practice, that appears neutral on its face, in fact has a disparate impact or effect on a protected class. See Patterson v. Magnolia Regional Health Center, 2001 WL 1524419, *2 (N.D. Miss. 2001). If the plaintiff meets this burden, the burden shifts to the defendants to prove a substantial legitimate justification for the practice. Id. If the defendants prove a valid justification, the plaintiff may still prevail by presenting evidence that the legitimate practice is a pretext for discrimination. Id.

The plaintiff cannot meet his burden. His complaint identifies only one individual, himself, who has allegedly been adversely impacted. Furthermore, the defendant have asserted a substantial legitimate justification for the challenged personnel practices, which has not been shown to be pretextual.

The plaintiff's claim of retaliation is similarly deficient. Title VII makes it unlawful for an employer to discriminate against an employee for making a charge under the Civil Rights Act. See 42 U.S.C. s 2000e-3(a). In order to establish a prima facie case of retaliation, the plaintiff must show: (1) he was engaged in a protected activity; (2) there was an adverse action taken against him; and (3) a casual connection exists between the protected activity and the adverse employment action. Shirley v. Chrylser First, 970 F.

2d 39, 42 (5th Cir. 1992) ; Barrow v. New Orleans SS Assn, 10F. 3d 292, 298 (5th Cir. 1994). On a motion for summary judgment, the Court will weigh heavily the timing between the protected activity and the adverse employment action in deciding if the employer's reasons for the adverse action pretextual. Shakleford v. Deloitte & Touche, LLP, 190 F. 3d 393, 408-409 (5th Cir. 1999).

In his Complaint, the plaintiff alleges that he was retaliated against when he refused to make negative log entries into the performance log of an African-American employee whom he supervised. This incident allegedly occurred on a about December

2001. As stated previously, this incident predated the plaintiff's charge of discrimination, referred to the EEO Counselor on June 11, 2002. By more than 45 days. Furthermore, the plaintiff has produced no evidence that a written reprimand was issued for his refusal to make such a log entry. Even assuming that the plaintiff can establish that he had engaged in activity protected by Title VII prior to te alleged written letter of reprimand, he cannot prove that he suffered an adverse employment action. As articulated above, the Fifth Circuit has stated that the purpose of Title VII is to address "ultimate employment decisions," Mattern v. Eastman Kodak Co., 104 F. 3d 702, 707 (5th Cir. 1997) (citing Dollis v. Rubin, 77 F. 3d 777, 781-82 (5th Cir. 1995)). These ultimate decisions include such actions as "hiring, granting leave, discharging, promoting, and compensating."

Id. Other acts, such as documented reprimands, verbal threats of being fired, and placement on "final warning" do not constitute ultimate employment actions. Id. at 780. Thus, the alleged letter of reprimand cannot constitute an ultimate employment decision, and the plaintiff cannot maintain his claim for retaliation.

The Court therefore finds that the defendants' motion to dismiss, or in the alternative for summary judgment (**docket entry 23**), which the Court has converted to a motion for summary

judgment, is well taken.

A separate order of even date herewith shall be entered, granting the motion, and a final judgment shall also be entered dismissing this case with prejudice.

This the 7th day of January, 2005

S/David Bramlette
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

Southern District of Mississippi
FILED

JAN 10 2005
J T. Noblin, Clerk
By_____Deputy

DANNY WILLIAMS PLAINTIFF(S)

VERSUS CIVIL ACTION NO. 5:03cv442BrSu

JOHN ASHCROFT, et al DEFENDANT(S)

RULE 16.1(A) INITIAL ORDER

The above captioned cause is set for a **TELEPHONIC CASE MANAGEMENT CONFERENCE (CMC)** on December 12, 2003, at 2:00 p.m. before:

Magistrate James C. Sumner
245 East Capitol Street
Room 400
Jackson, MS 39201
(601) 965-4292

UNLESS OTHERWISE AGREED, IT SHALL BE THE RESPONSIBILITY OF COUNSEL FOR THE PLAINTIFF TO SET UP THE CONFERENCE CALL AT THE SCHEDULED TIME.

RULE 16.1(B) (1) ATTORNEY CONFERENCE

No later than twenty one(21) days prior to the CMC, counsel shall confer, either in person or telephonically, regarding the following matters:

1. Identify the principal factual and legal issues in Dispute;

2. Discuss the principal evidentiary basis for claims and defenses;

3. Determine the differentiated case management case track, days required for trial, and wether the Case should be considered for Alternative Dispute Resolution (ADR);

4. Discuss when voluntary disclosure of documents or other information should be made pursuant to Rule 26.1 [no later than fourteen(14) days after the attorney conference, Local Rule 16.1(B)(7)];

5. Identify any motions whose early resolution would have significant impact on the scope of discovery or other aspects of the litigation.

6. Consistent with the case track recommendations, determine what additional discovery is required beyond the voluntary disclosures and initial depositions of the parties, with designated time limitations;

7. Discuss whether all parties consent to jurisdiction by a magistrate judge;

8. Discuss time for the loca Rule 16.1 settlement Conference;

9. Discuss settlement prospects full with each other and their respective clients and represent to the Court that they have done so and communicate the costs of going through litigation and the appeal process with each's respective clients and represent to the Court that they have done so.

10. Discuss preparation of a proposed case management order. Scheduling deadlines based on the track designation should not be included in the proposed case mamagement order . All deadlines shall be determined at at the telephonic case mamagement conference.

PROPOSED CASE MAMAGEMENT ORDER
CONFIDENTIAL SETTLEMENT
MEMORANDA

Counsel are instructed to submit a proposed case Management order **by mail (NO FAXES)** to the judge no later than fourteen (14) days after the attorney conference. By the deadline, counsel shall also submit an original and one(10 copy of a memorandum (3 page maximun) setting forth a brief explanation of the case, and a candid appraisal of the respective positions, inducing possible settlement figures. Counsel will also furnish in their memoranduma good faith estimate of the expense of carring the litigation through trial and the appellate

process, if not settled,and will have discussed and will represent to the Court that they have so discussed these costs with their respective clients and will be prepared tp candidly discuss them with the Court. These memoranda are **not** to be exchanged and will be viewed only by the Court. These will not become a part of the record and will be destroyed upon the resolution of the case.

CASE MANAGEMENT PLAN

At the conference, the Court and the parties shall:

1. Identify the principal factual and legal issues in Dispute;

2. Identify the alternative dispute prodcedure which or report specifically why no such procedures would assist in the resolultion of the case;

3. Indicate whether all parties consent to Jurisdiction by a magistrate judge;

4. Review the parties' compliance with their disclosure obligations and consider whether to order additional disclosures;

5. Determine whether to order early filing of any motions that might significantly affect the scope of discovery or other aspects of the litigation, and provide for the staged resolution, or bifurcation of issues for trial consistent with 42(b) **Feb. R. Civ. P.;**

6. Determine the plan for at least the first stage of discovery tool, time periods and other appropriate matters;

7. Determine the date for the Local Rule 16.1 (C) settlement conference or mediation;

8. Discuss scheduling andset apropriate scheduling deadlines including dates for settlement conference, completion of discovery, motion, final pretrial conference and trial.

CASE MANAGEMENT ORDER

A Case Management order shall be entered by the Court within ten (10) days of the conference. A

Uniform Case Management order has been developed and is available on the Court web site at www.mssd.uscourts.gov and as Form no. 1 in the revised Uniform Local Rules, effective December 1, 2000. Counsel shall use that format in discussions and preparation.

J. T. NOBLIN, CLERK

Date: 11/12/03 By: s/ P. McPhail
Deputy Clerk

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7710
600 CAMP STREET
NEW ORLEANS, LA 70130

MAY 23, 2005

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 05-60105 Williams v. Gonzales
USDC No. 5:03-CV-442

The court has denied the appellant's motion to supplement the record in this case.

Sincerely,

CHARLES R. FULBRUGE III, CLERK

BY: s/ Tania Bechtel
Tania Bechtel, Deputy Clerk
504-310-7644

Mr Danny Williams
Ms Felicia Collete Adams

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